

APR 5 1983

ALEXANDER L. STEVAS,
CLERK

No.

in the
Supreme Court
of the
United States

October Term, 1982

BRITO ENTERPRISES, INC.,
T/A BRITO'S BOATYARD,

Petitioner

vs.

H. J. WESTBERRY,

Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT**

ROBERT LAMAR BELL
1529 Alfred I. Dupont Building
169 East Flagler Street
Miami, Florida 33131

Counsel for Petitioner

QUESTIONS PRESENTED

- (1) The lower Federal Courts have failed to apply Florida case law concerning bailments, damages, and pre-judgment interest and the Florida Statute of Frauds in a case where state law is controlling as a common law bailment was claimed where a seller of a shrimp boat is attempting to hold a boatyard which was not a party to the transaction liable because the seller claims that he did not receive the balance of the purchase price from the purchaser in a transaction to sell the boat which the seller had made at the boatyard with another party and which did not benefit the boatyard.
- (2) The lower Federal Courts also misapplied admiralty principles, precedents, and jurisdiction and extended the Federal Admiralty jurisdiction to sanction the seller's claims although the Federal Courts and the Admiralty area in particular are committed to limited jurisdiction concepts according to traditional and historical bases contained in the Constitution, Statutes, and cases in the Courts of the United States.

INDEX

	Page
Questions Presented	i
Opinions Below	2
Jurisdiction	2
Statutes Involved	3
Statement of Case	5
Reasons for Granting Writ	10
Conclusion	13
Proof of Service	14
Appendix A	
Opinions Below	App. A-1
Appendix B	
Statutes Involved	App. B-1
Appendix C	
References to Federal Question	App. C-1
Appendix D	
Judgment and Findings of Fact and Conclusions of Law of the United States District Court, Southern District of Florida, Key West Division	App. D-1

TABLE OF CASES

	Page
<i>Allied Van Lines, Inc. v. McKnab,</i> 331 So.2d 319 (Fla. App. 2d Dist. 1976)	11
<i>Dade County v. O. K. Auto Parts of Miami,</i> 360 So.2d 441 (Fla. App. 3rd Dist. 1978)	11
<i>Eastern Airlines Employees Federal Credit Union v. Lauderdale Yacht Basin, Inc.,</i> 334 So.2d 175 (Fla. App. 4th Dist. 1976)	8
<i>Florida Small Business Corp. v. Miami Shipyards Corp.,</i> 175 So.2d 46 (Fla. App. 3rd Dist. 1965)	11
<i>McCoy v. Rudd,</i> 367 So.2d 1080 (Fla. App. 1st Dist. 1979)	11
<i>McDonald Air Conditioning, Inc. v. John Brown, Inc.,</i> 285 So.2d 697 (Fla. App. 4th Dist. 1973)	11
<i>Rea v. The Eclipse (The Eclipse),</i> 135 U.S. 599, 10 S.Ct. 873, 34 L.Ed. 269 (1890) .	11
<i>Rudisill v. Taxicabs of Tampa, Inc.,</i> 147 So.2d 180 (Fla. App. 2d Dist. 1962)	11
<i>Smith v. Atlantic Boat Builder Co.,</i> 356 So.2d 359 (Fla. App. 1st Dist. 1978)	8

TABLE OF CASES (Continued)

	Page
<i>Town of Longboat Key v. Carl E. Widell and Son,</i> 362 So.2d 719 (Fla. App. 2d Dist. 1978)	11
<i>Wilburn Boat Co. v. Fireman's Fund Insurance Co.,</i> 348 U.S. 310, 75 S.Ct. 368, 1955 A.M.C. 467 (1955)	11

STATUTES

28 USC §1254(1)	2
28 USC §1333(1)	3, App. B-2
28 USC §1652	3, App. B-2
28 USC §2101(c)	2
46 USC §971	4, 6, 8, App. B-3
United States Constitution, Article III, Section 2, Clause 1 excerpt	4, App. B-3
Florida Statutes §687.01	4, 10, App. B-4

TABLE OF CASES (Continued)

	Page
Florida Statutes §713.60	4, 8, App. B-3
Florida Statutes §725.01	3, App. B-2
MISCELLANEOUS	
34 ALR Fed 126	11

No.

in the
Supreme Court
of the
United States

October Term, 1982

BRITO ENTERPRISES, INC.,
T/A BRITO'S BOATYARD,

Petitioner

vs.

H. J. WESTBERRY

Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT**

To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:

Brito Enterprises, Inc. trading as Brito's Boatyard, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals Eleventh Circuit entered in the above-entitled case on December 3, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals Eleventh Circuit is unreported and is printed in Appendix A hereto, *infra*, page App. A-2. The judgment of the United States Court of Appeals Eleventh Circuit is printed in Appendix A hereto, *infra*, page App. A-2. The Journal Entry of Judgment of the United States District Court in and for the Southern District of Florida, Key West Division is printed in Appendix D hereto, *infra*, page App. D-1.

JURISDICTION

The judgment of the United States Court of Appeals Eleventh Circuit (Appendix A, *infra*, page App. A-2) was entered on December 3, 1982. A timely petition for rehearing was denied on January 5, 1983 (Appendix A, *infra*, page App. A-1). The jurisdiction of the Supreme Court is invoked under 28 USC §1254 (1) and 28 USC §2101 (c).

STATUTES INVOLVED

Florida Statutes §725.01 Promise to pay another's debt, etc. . . .

No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person . . . unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by him thereunto lawfully authorized.

28 USC §1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 USC §1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

United States Constitution, Article III, Section 2, Clause 1. Subjects of jurisdiction

The judicial Power shall extend to all Cases . . . of admiralty and maritime Jurisdiction. . . .

46 USC §971 MARITIME LIENS FOR NECESSARIES, Persons entitled to lien

Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessities, to any vessel . . . upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel. . . . (Emphasis added).

Florida Statutes §713.60 Liens for labor on or for vessels

In favor of any person performing for himself or others, any labor, or furnishing any materials or supplies for use in the construction of any vessel or watercraft; and in favor of any person performing for himself or others, any labor or service of any kind, on, to or for the use or benefit of a vessel or watercraft, including masters, mates and members of the crew and persons loading or unloading the vessel or putting in or taking out ballast; upon such vessel or watercraft, whether partially or completely constructed and whether launched or on land, her tackle, apparel and furniture.

Florida Statutes §687.01 Rate of interest

In all cases where interest shall accrue without a special contract for the rate thereof, the rate shall be six per cent per annum. . . .

STATEMENT OF CASE

The United States Court of Appeals Eleventh Circuit by not writing an opinion either in its decision of the appeal which affirmed the Trial Court or in its order denying rehearing to Petitioner thus made the judgment, findings of fact, and conclusions of law of the Trial Court its own.

The decision in the lower Court awarded damages to Claimant for the loss of Claimant's vessel on a bailment theory against Petitioner Boatyard in the amount requested by Claimant plus certain expenses and deducted monies previously received by Claimant from the intended purchaser of the shrimp trawler.

The result decreed by the Trial Court is not supported by the Claimant's own testimony who testified not once but four times that he was not dealing with Petitioner Boatyard, and his wife agreed in her testimony that claimant was not dealing with Petitioner but was selling his shrimp trawler to another party.

There was no agreement between Claimant and Petitioner for dockage, storage, or repair of the shrimp boat, and Petitioner was not handling the sale of the vessel for either party. Petitioner was told and Claimant so testified that Claimant was selling the boat to another party who would be responsible for dockage, storage, and repairs, if any.

Claimant was not the customer of the Boatyard in any capacity. Claimant did not pay any money to the Boatyard and did not have any agreement to pay any money to the Boatyard or anyone acting on behalf of the Boatyard according to the Claimant's own testimony and that of his wife.

The Boatyard did not charge Claimant for any dockage, storage, or repairs which were for the account of the purchaser and which were not paid so that the Boatyard also incurred a substantial loss in connection with this matter. The Boatyard could not assert a maritime lien or other admiralty action against Claimant because the Boatyard did not have a contract with Claimant as required by 46 USC §971 which is set forth above.

In fact the Petitioner Boatyard was led to believe by Claimant and one of its officers acting in his private capacity (and adversely to the Boatyard) that the shrimp boat "Captain Henry" was being sold by Claimant to a purchaser who was taking title so that the Boatyard could contract with the purchaser for any dockage, storage, or repairs and thus protect the Boatyard's own interests to insure that payment would be received for any services rendered to the purchaser.

Petitioner believed that it was dealing with the purchaser and not with Claimant. One of the officers of the Boatyard acting in his private capacity was representing the purchaser according to Claimant's own testimony.

Claimant knew that Petitioner was not involved in the transaction. Although M. E. Powlus was a Vice President of Brito Enterprises, Inc. trading as Brito's

Boatyard and represented the purchaser in the acquisition of Claimant's shrimp boat, Claimant knew at the time of beginning the transaction and prior thereto (as amply acknowledged by Claimant in his own testimony at trial) that Mr. Powlus was not acting for the Boatyard and could not as other officers of the Boatyard with greater authority were present and were known to Claimant.

Mr. Brito as President of the Boatyard as an accommodation to both parties cashed the purchaser's check for the down payment on the purchase price in the presence of Mr. Powlus and Claimant who was from out of town and wanted cash quickly as the Fourth of July holiday had affected transactions through the banks. While thus assisting the parties by cashing the purchaser's check to provide cash more quickly to the Claimant who was anxious to return home as soon as possible, Petitioner believed that it had witnessed a transaction between Claimant and one of its own officers acting in his private capacity and as the agent of the purchaser.

Claimant later testified at trial that he knew from the very beginning that Mr. Powlus was acting as the agent of the purchaser and was not acting on behalf the Petitioner.

When Mr. Powlus delivered the shrimp boat "Captain Henry" to the purchaser, he was acting as the purchaser's agent although Claimant appeared to assert some dual agency as Claimant had given certain instructions to Mr. Powlus which were according to Claimant's interests as alleged by Claimant in his testimony at the time of trial.

When Mr. Powlus delivered the shrimp boat "Captain Henry" to the purchaser, he was acting for the purchaser and possibly adversely to Claimant as well as adversely to Petitioner which was unable to assert a lien against the vessel for the repair bill under state law without having actual possession of the boat. See Florida Statutes §713.60 and the cases of *Smith v. Atlantic Boat Builder Co.*, 356 So.2d 359 (Fla. App. 1st Dist. 1978) and *Eastern Airlines Employees Federal Credit Union v. Lauderdale Yacht Basin, Inc.*, 334 So.2d 175 (Fla. App. 4th Dist. 1976).

Petitioner's potential admiralty action against the vessel was divested because Petitioner could not locate the vessel to arrest same but more importantly than the impossibility of seizure because Petitioner was subsequently confronted with Claimant's assertion that he still owned the vessel as the balance of the purchase price had not been paid and that Petitioner therefore had no contract with the owner of the vessel for repair work as required by 46 USC §971.

It was several weeks after the transaction and the delivery of the shrimp boat to the purchaser that Claimant alleged an impasse in his dispute with the purchaser through Mr. Powlus as to the balance of the purchase price claiming that same was unpaid. It was subsequently that Claimant first reported the shrimp boat missing and finally indicated his intent to make a claim against the Boatyard.

The shrimp trawler "Captain Henry" was being sold by Claimant as is where is at the Boatyard in Key West, Florida and even if Petitioner were somehow

liable for its loss, the Court employed an erroneous measure of damages as a matter of law by utilizing speculative testimony as to what the vessel may have been worth at another time and place in Georgia prior to being brought to Florida and under other conditions. The Court also apparently accepted Claimant's statements as to what he thought his vessel was really worth although Claimant was agreeable to selling same to the purchaser for Thirty Thousand Dollars (\$30,000) less than what he later claimed and what the Court awarded to him.

Claimant asserted that the contemplated sale was tantamount to a distress sale. However, Claimant voluntarily released his Captain and crew because he was making the sale and because he did not want to spend any money for needed repairs and thereafter to return the vessel to Georgia.

The Court also erred as a matter of law by awarding prejudgment interest as if the case were an admiralty action because same is not allowed under Florida law where the amount of the claim is disputed but only if the claim is completely liquidated. Claimant said his vessel was really worth Ninety Thousand Dollars (\$90,000) although he had voluntarily agreed to sell same for Sixty Thousand Dollars (\$60,000), and Petitioner appraised the shrimp trawler at a value of Thirty Thousand (\$30,000) based upon viewing the bottom of the boat when it was out of the water as well as its overall appearance and condition at the time of sale.

Awarding prejudgment interest adds approximately TWELVE THOUSAND FIVE HUNDRED DOLLARS

(\$12,500) to the claim at six per cent per year simple interest, not compounded according to the rate and formula which were applicable at the time under state law if prejudgment interest were allowable under state law. See Florida Statutes §687.01 set forth above.

The judgment in favor of Claimant does not specify an amount of interest being awarded nor any rate of interest or formula for computing same and does not state any basis for awarding same although the Court apparently acted upon admiralty principles and upon the requests of Claimant's counsel in adding prejudgment interest to the claim.

During the trial Claimant's counsel exhibited photographs of Claimant, President Carter, and members of the President's family who apparently had been on a fishing trip on Claimant's boat when it was still being used in Georgia considerably prior to coming to Key West, Florida. Petitioner's counsel objected to these photographs.

The shrimp trawler "Captain Henry" had been fishing in Key West for many months prior to Claimant deciding to sell the vessel.

REASONS FOR GRANTING WRIT

The action of the Trial Court is clearly erroneous and without sufficient foundation in the record to stand any scrutiny.

Aside from the fact that Petitioner's cause involves important matters to the litigants, that Petitioner's

appeal was denied, and that Petitioner is confronted with a very substantial adverse judgment relating to claimant's transaction with another which Petitioner did not guarantee and did not handle as a broker, there are special and important reasons why this Court should exercise its jurisdiction, review this matter, and grant the writ of certiorari.

If the Federal Courts in Florida or any other state are allowed to extend their own jurisdiction at the expense of valid states laws and contrary to Federal law, the balance existing between Federal and State laws which is inherent in our Constitutional system and implementing legislation is seriously affected.

For example, see *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S.Ct. 368, 1955 A.M.C. 467 (1955) and *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 201 F.2d 833, 1953 A.M.C. 284 (5th Cir. 1953); *Rea v. The Eclipse (The Eclipse)*, 135 U.S. 599, 10 S.Ct. 873, 34 L.Ed 269 (1890); *Rudisill v. Taxicabs of Tampa, Inc.*, 147 So.2d 180 (Fla App. 2nd Dist. 1962); *Florida Small Business Corp. v. Miami Shipyards Corp.*, 175 So.2d 46 (Fla. App. 3rd Dist. 1965); *Allied Van Lines, Inc. v. McKnab*, 331 So.2d 319 (Fla. App. 2d Dist. 1976). See also *McDonald Air Conditioning, Inc. v. John Brown, Inc.*, 285 So.2d 697 (Fla. App. 4th Dist. 1973); *Town of Longboat Key v. Carl E. Widell and Son*, 362 So.2d 719 (Fla. App. 2nd Dist. 1978); *Dade County v. O.K. Auto Parts of Miami*, 360 So.2d 441 (Fla. App. 3rd Dist. 1978); *McCoy v. Rudd*, 367 So.2d 1080 (Fla. App. 1st Dist. 1979); and 34 ALR Fed 126 and following.

The need to preserve the balance between state and Federal laws is especially important with respect

to the State of Florida and admiralty jurisdiction as Florida has a very extensive shoreline and very extensive business and activities related to maritime affairs.

With all of this admiralty activity, it is especially important for the Federal Courts in Florida to refrain from undermining valid State laws and Federal Statutes which require state law to be used for rules of decisions and saving to suitors their rights and remedies under state law.

Under a pretext of admiralty jurisdiction and some vague notion of equity to claimants, the Federal Courts in Florida should not be allowed to fail to apply valid state laws and applicable Federal Statutes to extend their admiralty jurisdiction.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert Lamar Bell

ROBERT LAMAR BELL

1529 Alfred I. Dupont Building
169 East Flagler Street
Miami, Florida 33131

Counsel for Petitioner

PROOF OF SERVICE

I hereby certify that I served three copies of the foregoing printed Petition for Writ of Certiorari together with appendices on John D. Kallen, Esquire and William E. Cassidy, Esquire of Hayden and Milliken, P.A., Counsel for Respondent H. J. Westberry, by delivering same to them or a clerk in their office at their current office address at Suite 63, 5915 Ponce De Leon Boulevard, Miami, Florida 33146 this 5th day of April, 1983. (Please note Counsel for Respondent have relocated their offices to the above address recently.)

Robert Lamar Bell
Robert Lamar Bell

Counsel for Petitioner
1529 Alfred I. duPont Building
169 East Flagler Street
Miami, Florida 33131

Appendix A

OPINIONS BELOW

[FILED JAN 5 1982]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5754

H. J. WESTBERRY,

*Plaintiff-Appellee,
Cross-Appellant,*

versus

BRITO ENTERPRISES, INC.

T/A BRITO'S BOATYARD, ET AL.,

*Defendants-Appellants,
Cross-Appellees.*

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING

Before RONEY and JOHNSON, Circuit Judges, and
DYER, Senior Circuit Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing
filed in the above entitled and numbered cause been and
the same is hereby denied.

ENTERED FOR THE COURT:

/s/ [illegible]

United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-5754

H. J. WESTBERRY,

*Plaintiff-Appellee,
Cross-Appellant,*

versus

BRITO ENTERPRISES, INC.
T/A BRITO'S BOATYARD, ET AL.,

*Defendants-Appellants,
Cross-Appellees.*

Appeals from the United States District Court
for the Southern District of Florida

(December 3, 1982)

Before RONEY and JOHNSON, Circuit Judges, and
DYER, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

Appendix B

STATUTES INVOLVED

Florida Statutes §725.01 Promise to pay another's debt, etc. . . .

No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person . . . unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by him thereunto lawfully authorized.

28 USC §1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 USC §1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

- (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

**United States Constitution, Article III, Section 2, Clause
1. Subjects of jurisdiction**

The judicial Power shall extend to all Cases
... of admiralty and maritime Jurisdiction....

**46 USC §971 MARITIME LIENS FOR NECESSARIES,
Persons entitled to lien**

Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessities, to any vessel ... *upon the order of the owner of such vessel, or of a person authorized by the owner,* shall have a maritime lien on the vessel.... (Emphasis added).

Florida Statutes §713.60 Liens for labor on or for vessels

In favor of any person performing for himself or others, any labor, or furnishing any materials or supplies for use in the construction of any vessel or watercraft; and in favor of any person performing for himself or others, any labor or service of any kind, on, to or for the use or benefit of a vessel or watercraft, including masters, mates and members of the crew and persons loading or unloading the vessel or putting in or taking out ballast; upon such vessel or watercraft, whether partially or

**completely constructed and whether launched
on land, her tackle, apparel and furniture.**

Florida Statutes §687.01 Rate of interest

**In all cases where interest shall accrue without
a special contract for the rate thereof, the rate
shall be six per cent per annum. . . .**

Appendix C

REFERENCES TO FEDERAL QUESTION

This case did not begin in State Court.

Appendix D

JUDGMENT AND FINDINGS OF FACT AND
CONCLUSIONS OF LAW OF THE UNITED
STATES DISTRICT COURT SOUTHERN
DISTRICT OF FLORIDA KEY WEST
DIVISION

[FILED MAY 27 1981]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-4611-Civ-JWK

H. J. WESTBERRY,

Plaintiff,

vs.

BRITO ENTERPRISES, INC., etc., et. al.,

Defendants.

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law entered this day in the above styled cause, it is

ORDERED, ADJUDGED AND DECREED that Plaintiff have and recover of the Defendant the sum of \$81,500 dollars, plus prejudgment interest thereon at the rate provided by law commencing from the 24th day of July, 1978, until January 12, 1981. Plaintiff's costs of action and post-judgment interest shall also accrue as provided by law.

DONE AND ORDERED in chambers at Miami, Florida, this 27 day of May, 1981.

/s/ James W. Kehoe

JAMES W. KEHOE
UNITED STATES
DISTRICT JUDGE

CC: All Counsel

[FILED MAY 27 1981]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-4611-Civ-JWK

H. J. WESTBERRY,

Plaintiff,

vs.

BRITO ENTERPRISES, INC., etc., et. al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came before the Court for trial without a jury. The Court heard the testimony of witnesses and argument of counsel, reviewed the documentary evidence, and is otherwise fully advised in the premises. Accordingly, the Court now makes the following Findings of Fact and publishes its Conclusions of Law:

I

FINDINGS OF FACT

1. The Plaintiff, H. J. WESTBERRY, is an individual and a resident of the State of Georgia and was doing business in the State of Florida as the owner and operator of the fishing vessel, the F/V CAPTAIN HENRY. The Plaintiffs' principal place of business was in Brunswick, Georgia and not in the State of Florida.

2. The Defendant, BRITO ENTERPRISES, INC. d/b/a BRITO'S BOATYARD, was a Florida Corporation and was and is doing business in the State of Florida, in Key West, as a marina, boat repairer and provider of dockage and storage.

3. The Plaintiff purchased the said vessel in 1969. At that time, the vessel was the largest of its kind on the Georgia coast. The vessel had a 12,000 gallon fuel capacity and could store 40 tons of ice. The vessel was initially operated exclusively in Georgia.

4. Subsequently, approximately three and one-half years prior to July of 1978 the Plaintiff operated the vessel down the east coast, in the Bahamian waters and also in the Gulf of Mexico.

5. In July of 1978 the Captain of this vessel was advised that a Mr. Joe Roberts wanted to buy the vessel. The Plaintiff instructed the Captain to arrange for tentative storage for the vessel.

6. That between the later part of June and early July of 1978 the Plaintiff, H. J. WESTBERRY, delivered the F/V CAPTAIN HENRY to the Defendant, BRITO ENTERPRISES, INC., to be held by the Defendant pending further instruction from the Plaintiff.

7. That the Plaintiff, believing that he had a buyer for the vessel in the amount of \$80,000, traveled to BRITO'S BOATYARD in Key West, Florida on July 3, 1978 and later learned that no one knew of Mr. Roberts and that the sale was destroyed.

8. The Plaintiff met with Mr. M. E. POWLUS who represented himself to be the Vice-President of BRITO'S BOATYARD. Mr. M. E. POWLUS was an inside man and was clothed with all the indicia of being an agent of the Defendant. The Defendant had no reservations regarding any of Mr. POWLUS' qualifications.

9. Mr. M. E. POWLUS was the agent of the Defendant possessing all the necessary indicia of an executive agent to commit the Defendant BRITO'S BOATYARD to a Bailment Contract.

10. Mr. M. E. POWLUS, as agent for Defendant, also undertook to advise the Plaintiff concerning a second purchaser who was interested in buying the F/V CAPTAIN HENRY for \$60,000, cash sale. Mr. M. E. POWLUS never disclosed the name of the purchaser to the plaintiff.

11. During that period, the Plaintiff's wife was of ill health and that the Captain and crew of the F/V CAPTAIN HENRY had been terminated. Under these circumstances, the Plaintiff while believing that the vessel was worth more than \$80,000.00, agreed to sell the vessel for the \$60,000.00 offer under the form of an option agreement, taking a \$10,000.00 down payment as a binder with the understanding that the balance would be paid within 14 days, i.e., by July 19, 1978, or the option would lapse and the binder would be forfeited.

12. The Court finds that the vessel was worth \$90,000.00 at the time it was intrusted to the Defendant's care.

13. With respect to the sale of the vessel, MR. POWLUS was not acting on behalf of BRITO'S BOATYARD, but was acting strictly on his own behalf.

14. Mr. Artie Brito Williams, the President of BRITO ENTERPRISES, INC., was aware of the sale/option agreement and he was present at the time that the \$10,000.00 binder was paid and in fact, transferred a \$10,000.00 check into cash.

15. The Plaintiff delivered the keys to MR. POWLUS and gave absolute and specific instructions to MR. POWLUS, in his capacity as agent for the Defendant, not to release the vessel until such time as the prospective owners appeared in Savannah, Georgia, at which time the Plaintiff would call MR. POWLUS and instruct him to release the vessel.

16. On July 17, 1978, two days prior to the expiration of the option agreement, the Plaintiff contacted MR. POWLUS to remind him that there only two days left on this option.

17. The option period expired on July 19, 1978, without the payment of the cash balance being received by the Plaintiff.

18. On July 20th, the Plaintiff called the Defendant and was told that the buyers were supposed to have already paid and gotten title. The Plaintiff advised MR. POWLUS that he had not received payment and for the CAPTAIN HENRY to remain at the boatyard until the Plaintiff instructed him otherwise.

19. On July 25, 1978, the Plaintiff called BRITO'S BOATYARD and spoke to Mr. M.E. POWLUS and was advised that the vessel was released on July 24, 1978.

20. That the Plaintiff, surrendered complete possession and control of the vessel when he turned the keys over to MR. POWLUS with express instructions not to do anything with the vessel without specifically receiving instructions from the Plaintiff. This action thereby created a bailment between Plaintiff and Defendant as to the vessel.

21. The Court finds that no one knows where the vessel is today. Although the Plaintiff notified the United States Coast Guard in Savannah, Georgia and Key West, Florida, the Captain of the ports in Key West and Savannah and Brunswick, Georgia and other state officials, the vessel has never been recovered or returned to the Plaintiff.

II

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the controversy pursuant to Title 28 U.S.C. §1332 since this is an action involving parties who are citizens of different states and the matter in controversy exceeds the sum of \$10,000.

2. The Court has determined that it has jurisdiction as well under 28 U.S.C. §1333 where this action involves a maritime contract for bailment and management of a

vessel. Admiralty principles may be applied to a controversy arising out of a claim of negligence in the dockage and storage of a vessel and the non-performance of a maritime contract of bailment. The Court considers the contract maritime for these reasons:

To begin with, the contract is everything classically known as a maritime contract. It concerns a ship. It relates not only to a ship; its very purpose is to effectuate the physical, economic operation and employment of a vessel. And what is here in controversy are the fruits of such operation. The subject matter, in the sense of the thing, its purpose, and its result all center around the ship. It meets all of the tests both ancient and modern. (footnote and citations ommitted)

Hadjipateras v. Pacifica, 290 F.2d 697, 703 (5th Cir. 1961)

3. Mr. M. E. POWLUS had actual or apparent authority to act on behalf of the Defendant and his action of acceptance of the keys to the F/V CAPTAIN HENRY from the Plaintiff, was sufficient to form a bailment relationship between the parties.

4. A vessel placed at a dock for storage may result in a bailment for the mutual benefit of the owner of the vessel and the operator of the dock. *Orrell vs. Wilmington Iron Works, Inc.*, 185 F.2d 181, (4th Cir. 1950), *Fireman's Fund American Insurance Company vs. Captain Fowler's Marina, Inc.*, 343 F.Supp. 347, (D. Mass., 1971). Unless stipulated otherwise, such a bailment

imposes upon the bailee the duty of ordinary care. Any failure on the bailee's part to exercise this degree of care of negligence which renders the bailee liable to the bailor for all damages proximately flowing therefrom. *Orrell v. Wilmington Iron Works*, *supra*.

5. The burden of proof of negligence is on the bailor, but by proving that the vessel was delivered to the bailee in good condition, and damaged while in his possession, the bailor, makes out a *prima facie* case of negligence. The duty then devolves upon the bailee to go forward with the evidence and show affirmatively that he exercised ordinary care. *Stegemann v. Miami Beach Boat Slips*, 213 F.2d 561 (5th Cir. 1954). See generally, annot., 65 A.L.R.2d 1228 (1959).

6. When the plaintiff has established a *prima facie* case, the Defendant may overcome Plaintiff's case by proving affirmatively that it exercised the proper degree of care, or that the loss was due to causes in no way connected with this lack of care. *Stegemann v. Miami Beach Boat Slips*, 213 F.2d 561 (5th Cir. 1954); *Orrell v. Wilmington Iron Works*, *supra*; annot., 44 A.L.R. 3d 1332 (1972).

7. The Court concludes that the Defendant breached its duty under the bailment contract due to its gross negligence in releasing the vessel without receiving express instructions from the Plaintiff beforehand. This unauthorized action of the Defendant was the legal cause of Plaintiff's damages. The Court has determined that the Defendant has failed to sustain its burden of proving that its action was reasonable in releasing the F/V CAPTAIN HENRY.

8. Because jurisdiction is predicated upon diversity of citizenship as well as general maritime law, this court may apply Florida law with respect to damages. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed.2d 1188 (1938).

9. The initial measure of damages in this instance is the market value of the vessel on the date of the loss. *Allstate Van Lines Corp. v. Lebenstein*, 303 So.2d 33 (Fla. 3d DCA 1974). Here the court expressly found that the vessel was worth \$90,000 on the date of its loss. This amount is reduced by the \$10,000 cash option payment received by Plaintiff at the time of bailment, leaving Plaintiff with an initial loss of \$80,000.

10. In addition to this initial loss, the Plaintiff incurred \$1,500.00 in related expenses as a direct and proximate result of the Defendant's breach.

11. Plaintiff has also requested an award for loss of profits that he would have made but for Defendant's gross negligence. The Court declines to make an additional award for any loss of profits where the evidence presented on this issue at trial did not establish the requisite reasonable degree of certainty and any award would be speculative and uncertain. 5. A. Corbin, *Contracts* §1022 (1964).

12. As for Plaintiff's claim for prejudgment interest, the Court will apply admiralty principles to make an award for prejudgment interest:

It has long been held proper for admiralty courts fully to restore the injured party to his

condition at the time of injury by allowing and fixing prejudgment interest from the date of the loss in proceedings involving property damage.

Alcoa Steamship Co. v. Charles Ferran & Co., 443 F.2d 250, 256 (5th Cir. 1971) (quoting from *Petition of City of New York*, 332 F.2d 1006, 1007 (2d Cir. 1964)). Accordingly, the Court will award Plaintiff prejudgment interest from July 24, 1978 to the date of trial, January 12, 1981. Interest will be calculated at the rate provided by law.

DONE AND ORDERED in chambers at Miami, Florida, this 27 day of May, 1981.

JAMES W. KEHOE
JAMES W. KEHOE
UNITED STATES
DISTRICT JUDGE

CC: Robert L. Bell, Esquire
William E. Cassidy, Esquire